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*Attorneys for Plaintiff and Counter-
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

vs.

APPLE INC.,

Defendant, Counterclaimant.

No. 4:20-CV-05640-YGR-TSH

**EPIC GAMES, INC.'S NOTICE OF
MOTION AND MOTION TO APPOINT
SPECIAL MASTER**

Date: April 20, 2021 at 2:00 p.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

**EPIC GAMES, INC.'S NOTICE OF MOTION AND MOTION TO APPOINT SPECIAL
MASTER**

Case No.: 4:20-cv-05640-YGR-TSH

**NOTICE OF MOTION AND MOTION TO APPOINT SPECIAL MASTER
TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT on April 20, 2021, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, before the Honorable Yvonne Gonzalez Rogers, Plaintiff and Counter-Defendant Epic Games, Inc. (“Epic”) will and hereby does move this Court pursuant to Federal Rule of Civil Procedure 53 to appoint the Honorable Elizabeth D. Laporte (Ret.) as Special Master to supervise and preside over the pre-trial resolution of objections to designations to deposition testimony (“Deposition Objections”) in the above-captioned action (the “Action”). Alternatively, Epic requests that the Court rule on this motion on the papers at the Court’s earliest convenience.

This motion is made pursuant to the Court’s Standing Order Re: Pretrial Instructions in Civil Cases and Pretrial Order No. 2 (ECF No. 381) wherein the Court ordered Epic and Defendant and Counterclaimant Apple Inc. (“Apple”) (together, the “Parties”) “to hire a retired judicial officer to resolve their objections, to the extent that there are any” to the Parties’ respective deposition designations in the above-captioned action (the “Action”). Epic is optimistic that the Parties, with the assistance of Judge Laporte, will be able to successfully resolve all Deposition Objections in advance of trial, as ordered by the Court. Nevertheless, Epic believes that the formal appointment of Judge Laporte as Special Master is necessary to create a mechanism to preserve for judicial review any discrete issue or issues that a Party might believe merits the attention of the Court.

This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Proposed Order Appointing Special Master for Pre-Trial Rulings, the Declaration of Justin C. Clarke (the “Clarke Decl.”), all matters with respect to which this Court may take judicial notice, and such oral and documentary evidence as properly may be presented to the Court.

Pursuant to Federal Rule of Civil Procedure Fed. R. Civ. P. 53, Epic respectfully moves the Court to appoint the Honorable Elizabeth D. Laporte (Ret.) as Special Master to preside over and resolve Deposition Objections in this Action.

I. STATEMENT OF FACTS

In its March 23, 2021 Order, the Court ordered the Parties “to hire a retired judicial officer to resolve their objections, to the extent that there are any” to the Parties’ respective deposition designations in the Action. (Pretrial Order No. 2, ECF No. 381). The Court also ordered the Parties to provide deposition designations, including counter designations, by April 27, 2021, “with all objections having been resolved”. (*Id.*) The Parties have met and conferred with respect to the selection of a retired judicial officer and have agreed to the retention of Judge Laporte, a retired Magistrate Judge for the Northern District of California who currently serves as a neutral at JAMS in San Francisco, CA. (Clarke Decl. ¶¶ 4-5.) Subject to the Court’s approval, the Parties have agreed to retain Judge Laporte and are in the process of meeting and conferring with Judge Laporte to resolve their respective Deposition Objections. (*Id.* ¶ 6.)

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 53(a)(1)(C), the Court may appoint a Special Master to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge in the district.” Courts in the Northern District have appointed Special Masters to assist parties in resolving a wide variety of disputes. *See, e.g., E-Smart Techs., Inc. v. Drizin*, No. C 06-05528 MHP, 2009 WL 35228, at *1 (N.D. Cal. Jan. 6, 2009) (appointing Special Master to assist parties in resolving their disputes regarding discovery and the designation of trade secrets); *Tierno v. Rite Aid Corp.*, No. C 05-02520 TEH, 2008 WL 3876131, at *3 (N.D. Cal. Aug. 19, 2008) (appointing Special Master to preside over remaining discovery and if necessary, rule on objections made during depositions). Pursuant to Federal Rule of Civil Procedure 53 orders of a Special Master can be preserved for judicial review by the filing of objections with the district court. *See* Fed. R. Civ. P. 53(f)(2) (“A party may file objections

1 to—or a motion to adopt or modify—the master's order, report, or recommendations no later than
2 21 days after a copy is served, unless the court sets a different time”).

3 **III. ARGUMENT**

4 The Parties are in agreement as to the selection of Judge Laporte to assist with the
5 resolution of Deposition Objections; and they have begun the process of meeting and conferring in
6 order to comply with the Court’s instruction that all Deposition Objections be resolved prior to
7 trial. Epic is optimistic that, in the context of this bench trial, the Parties, with the assistance of
8 Judge Laporte, should be able to resolve all Deposition Objections without any need for judicial
9 oversight or intervention. Nevertheless, given the size, complexity and importance of this
10 litigation, Epic respectfully believes that some mechanism for judicial review is necessary in order
11 to protect the Parties’ rights both at trial and in any potential appeal.

12 Appointment of Judge Laporte as Special Master pursuant to Fed. R. Civ. P. 53 is
13 necessary in order to provide the Parties with a mechanism to preserve discrete evidentiary issues
14 that are of sufficient importance that a Party believes they warrant judicial review by the Court.
15 Epic has filed an accompanying Proposed Order Appointing Special Master for Pre-Trial Rulings,
16 providing for the appointment of Judge Laporte as Special Master and establishing a mechanism
17 to preserve Deposition Objections in the unlikely event that such preservation should become
18 necessary.

19 Epic has met and conferred with Apple concerning this Motion. Apple has indicated that it
20 will provide the Court with its position on the Motion in a separate filing on April 13, 2021.
21 (Clarke Decl. ¶ 7.)

22 **IV. CONCLUSION**

23 For the reasons discussed above, Epic respectfully requests that the Court grant this motion
24 and enter the proposed Order.

Dated: April 12, 2021

Respectfully submitted,

By: /s/ Gary Bornstein

Gary A. Bornstein

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